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STATEMENT OF THE CASE

The plight of migrant farmworkers in America was recognized by Congress decades ago. This case involves a federal private right of action — the centerpiece of the legislation Congress enacted to redress the persistent problems of that uniquely vulnerable and perennially exploited group.

A. The Legislative History of the Farmworkers' Federal Private Right of Action

1. *The Farm Labor Contractors Registration Act of 1963*

In 1963, Congress concluded that the "plight of the migrant laborer in this country is an inexcusable and cancerous sore in the body politic." 110 Cong. Rec. 19,896 (1964) (statement of Rep. Bennett). Their "transportation and living conditions are far below the general standard of living — are indeed inhuman, the very worst conditions of human life in this country, totally unacceptable for human beings." *Id.* at 19,894 (statement of Rep. Powell). At the same time, it was noted that few of the "protective measures of federal law enjoyed by other workers are extended to migratory laborers." *Id.* at 19,896 (statement of Rep. Ryan). Secretary of Labor Willard Wirtz testified that neither state nor federal law safeguarded migrant workers: "It is an anomaly that the workers who stand in the greatest need of social and economic protection are the ones who have been denied such protection." *Migratory Labor Bills: Hearings on S. 521 and Other Bills Before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare*, 88th Cong., 1st Sess. 29 (1963).

The Farm Labor Contractor Registration Act, Pub.L.No.88-582, 78 Stat. 920 (1963) ("FLCRA"), was enacted to stem the tide of "exploitation and abuse" of migrant workers at the hands of the farm labor contractors or crew leaders who managed and transported the workers to provide labor for farmers and orchard owners. S.Rep. No.202, 88th Cong., 1st Sess. 2 (1963). Such farm labor contractors were required to meet ex-

tensive qualification standards before the Department of Labor would register them and allow them to do business. One of the principal risks to migrant workers was transportation to worksites in unsafe vehicles operated by uninsured contractors. No farm labor contractor could obtain a certificate of registration until he had "give[n] the Secretary proof of his ability to respond in damages for liability arising in connection with vehicles used to transport migrant workers. . . . Insurance must be in the amounts required by State law, and in no event less than $5,000 for bodily injuries to or death of one person" and $20,000 for injury or death of all persons in a single accident. *Id.* at 6. The federal standards were intended to set a floor for migrant worker protections; the states remained free to enforce more stringent safeguards: "This bill makes it clear that this act will not excuse compliance with any State law or regulation, but rather is intended to supplement State action." *Id.* at 7. *See also id.* at 15 (text of FLCRA); H.R.Rep. No.358, 88th Cong., 1st Sess. 5 (1963).

2. *The 1974 Amendments to FLCRA*

In 1974, Congress found that the Department of Labor's administration of FLCRA was an abject failure: "It has become clear that the provisions of the Act cannot be effectively enforced. Noncompliance by those whose activities the Act was intended to regulate has become the rule rather than the exception. . . . It is quite evident that the Act in its present form provides no real deterrent to violations." S.Rep. No. 1206, 93d Cong., 2d Sess. 3 (1974) ("1974 S.Rep.").[1]

Congress identified the lack of a private cause of action as a primary cause of FLCRA's failure. 1974 S.Rep. at 3; H.R.Rep. No. 1493, 93d Cong., 2d Sess. 1 (1974) ("1974 H.R.Rep."). Accordingly, one of the "major purpose[s]" of the 1974 Amend-

[1] A 1973 Labor Department study found that two-thirds of labor contractors had never registered, and that 73% were violating FLCRA's worker protections. H.R.Rep. No.1493, 93d Cong., 2d Sess. 6 (1974). In the entire decade since FLCRA's enactment, the Department of Labor had referred only four cases to the Justice Department for prosecution, and only one contractor had been tried and convicted. 1974 S.Rep. at 3.

ments to FLCRA was to "creat[e] a civil remedy for persons aggrieved by violations of the act." 1974 H.R.Rep. at 1. Congress deemed "an unfettered federal civil remedy" to be "crucial to the effective enforcement of existing law," *id.* at 7, and Congress therefore consciously "patterned" FLCRA's private cause of action "after other federal statutes in the field of civil rights." *Farm Labor Contractor Registration Act Amendments of 1973: Hearings on H.R. 7597 Before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 112 (1973) (statement of FLCRA co-sponsor Rep. Ford).[2] The federal district courts were given jurisdiction over complaints of those aggrieved by violations of FLCRA without regard to the amount in controvery or the citizenship of the parties or the exhaustion of administrative remedies, and those courts were authorized to appoint attorneys for the complainants. 1974 H.R.Rep. at 11, 20. Upon a finding of an intentional violation of any provision of FLCRA, the court could "award damages up to and including an amount equal to the amount of actual damages, or $500 for each violation, or other equitable relief." *Id.*

The American Farm Bureau Federation, one of the *amici* now urging reversal of the judgment below, testified in opposition to the private right of action, urging that migrant workers be required to "seek administrative relief before filing a court action." *Farm Labor Contractor Registration Act Amendments, 1974: Hearings on S. 2070 and S. 3202 Before the Subcomm. on Employment, Poverty and Migratory Labor of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 2d Sess. 156 (1974) (statement of C.H. Fields, American Farm Bureau Federation) ("*1974 Senate Hearings*"). Congress rejected this plea, expressly providing that exhaustion of any alternative administrative remedies was unnecessary. 1974 S.Rep. at 9.

[2] In addition to providing much-needed compensation to injured farmworkers, FLCRA contained an anti-discrimination provision, forbidding intimidation, coercion or retaliation against farmworkers who asserted their rights under the Act by filing complaints or instituting private causes of action against someone alleged to have violated FLCRA. 1974 H.R.Rep. at 11. The current, substantially unchanged version of this provision is codified at 29 U.S.C. § 1855.

The most dramatic testimony supporting the need for such an "unfettered" federal remedy concerned a 1974 bus crash in Blythe, California, in which 19 migrant workers were killed and another 28 were maimed and injured. *1974 Senate Hearings* at 47-48 (statement of Daniel Boone, United Farmworkers Union). These workers were covered by California's workers' compensation program, *1974 Senate Hearings* at 182 (statement of Guinn Sinclair, Farm Labor Contractors Assoc.), but Congress was not convinced that benefit levels were adequate. Despite pleas from agricultural employers that Congress grant an exemption from FLCRA for those covered by California's workers' compensation scheme, and warnings that otherwise some state laws might be invalidated by FLCRA, *id.* at 180-81, Congress declined to legislate any such escape from FLCRA's insurance standards or its private cause of action.

3. *The Rejected 1978 Proposed Amendment to FLCRA*

In 1978, Congress heard complaints from agricultural employers and labor contractors that they were being forced to pay double insurance premiums — one premium for state workers' compensation for their agricultural workers and another for vehicle insurance required by FLCRA. Normally, an employer's vehicle liability policy carried a clause designed to make its coverage "dovetail" with — rather than overlap — state workers' compensation insurance. *Farm Labor Contractor Registration Act: Hearings on H.R. 8232 and Other Bills Before the Subcomm. on Economic Opportunity of the House Comm. on Education and Labor*, 95th Cong., 2d Sess. 34 (1978) ("*1978 House Hearings*") (statement of Rep. Ireland). Such a clause excluded coverage for injuries to employees transported in the vehicle and made the vehicle policy "consistent with the exclusive liability provisions of state workmen's compensation laws." *Id.* But the Department of Labor deemed the benefits available under even the nation's most generous workers' compensation regimes, such as California's, to be an inadequate substitute for federal remedies and insurance requirements. *1978 House Hearings* at 10 (letter of Warren Landis, Chief of the Employment Standards Administration, Department of Labor). For this reason, the Department directed that the usual employee exclusion clause be stricken from the vehicle insurance policies that FLCRA required labor contractors to obtain. A labor contractor was thus required to insure against injury to his migrant passengers even if they were already covered by workers' compensation. *Id.* at 34 (statement of Rep. Ireland); *see also id.* at 107 (statement of Roderick Shaw, Citrus Industry Council).

The agricultural industry and its insurance carriers were "afraid that someone might take the position that FLCRA preempted the exclusive remedy provision of state workmen's compensation law and allows double dipping, double recovery. That means after paying out [benefits] for permanent total injury under workmen's compensation, they might in turn get hit for some rather remarkable verdict against the same employer on the same injury in tort" under FLCRA. *1978 House Hearings* at 107 (statement of Roderick Shaw, Citrus Industry Council).

In response, Representative Ireland of Florida proposed an amendment to FLCRA under which a farm labor contractor who carried state workers' compensation insurance could invoke the exclusivity of the state workers' compensation scheme as a defense against recovery for death or bodily injury under the federal statute. H.R. 10631, 95th Cong., 2d Sess. (1978) ("the Ireland Amendment").[3] Representative Ireland explained that his amendment was designed to eliminate the possibility that federal "courts might conceivably allow 'double dipping' by agricultural workers," who might attempt to collect both from state workmen's compensation and from the additional

[3] The relevant portion of H.R. 10631 provided that, if an applicant for farm labor contractor registration has "filed proof satisfactory to the Secretary of the existence of a policy of workmen's compensation insurance which insures the payment of workmen's compensation benefits under State law for personal injury or death to migrant workers by accident arising out of and in the course of their employment in connection with his business, activities, or operations as a farm labor contractor, the policy of vehicle liability insurance provided by him *shall conform to the exclusive remedy provisions of the State workmen's compensation law*." *1978 House Hearings* at 4 (emphasis added).

vehicle liability policy that the contractor carried to cover liability under FLCRA's private right of action. *Id.* at 34 (statement of Rep. Ireland).[4]

The Department of Labor opposed the Ireland Amendment, maintaining its position that the level of benefits available under workers' compensation regimes was too low to warrant making them exclusive of recovery under federal law. Represenative Causey summarized the testimony of the Labor Department witnesses: "they were opposed to that section [the Ireland Amendment] on the ground that state workmen's compensation laws, in some cases, do not provide a level of compensation equal to what the Act requires," *1978 House Hearings* at 175.[5] Other witnesses likewise opposed the Ireland Amendment because it would relegate injured farmworkers to the inadequate compensation available from state workers' compensation programs. *1978 House Hearings* at 133 (statement of Burton Fretz, Migrant Legal Action Program).[6]

[4] "The proposed amendment makes clear Congress' intent that the vehicle liability insurance required by the Act should dovetail with rather than be in addition to workmen's compensation benefits," *1978 House Hearings* at 34 (statement of Rep. Ireland).

[5] Donald Elisburg, the Assistant Secretary of Labor, stated that "[t]he benefit levels under the workmen's compensation coverage, to the extent there is any, may be well below the protections that would be provided" by federal law. *1978 House Hearings* at 67. *See also id.* at 66 (statement of Herbert Cohen, Assistant Administrator, Wage and Hour Division) ("we are now satisfied that none of the State workers' compensation laws really fully satisfy the insurance provisions as they now stand in" FLCRA).

The Department of Labor offered additional reasons why workers' compensation benefits are an inadequate substitute for recovery under a federal right of action: workers' compensation coverage varies from state to state and protection for migrant workers is therefore uncertain; there is no liability unless the injury is work-related and definitions of that status vary enormously; and workers' compensation, unlike FLCRA, fails to protect either non-employee third parties or the families of migrant workers from injuries caused by labor contractors' vehicles. *1978 House Hearings* at 8 (letter of Donald Elisburg, Assistant Secretary of Labor). Warren Landis, Chief of the Employment Standards Administration, informed Congress that it would be "administratively infeasible to incorporate such varied and unclear State laws in meeting the Federal statutory requirements." *1978 House Hearings* at 10.

[6] There was also testimony in opposition to the Ireland Amendment's self-executing nature, which would have operated without federal administrative oversight. One witness expressed alarm that the bill simply provided that employer insurance policies "*conform to the exclusive remedy provisions of state law*," rather than delegating power to the Secretary of Labor "to waive existing insurance requirements" if a particular level of workers' compensation benefits was assured. *1978 House Hearings* at 133 (statement of Burton Fretz) (emphasis in original).

A spokesman for the Florida citrus industry, testifying in favor of the Ireland Amendment, envisioned two ways of eliminating the possibility of simultaneous recovery by an injured migrant worker under both workmen's compensation and FLCRA: (1) enactment of the Ireland Amendment, or (2) the insertion by Congress of "a statement in the record of this committee report saying quite convincingly that there is no intention for there to be any federally preemptive [sic] of the exclusive [remedy] provision of state workmen's compensation . . . ." *Id.* at 108 (statement of Roderick Shaw, Citrus Industry Council). Congress declined to pursue either path: the Ireland Amendment was rejected, and the legislative record is devoid of any expression of congressional intent to subject recovery under FLCRA's private cause of action to the exclusivity provisions of state workmen's compensation laws.

4. *The Migrant and Seasonal Agricultural Worker Protection Act of 1983*

The problem which emerged in the eight years following the 1974 FLCRA amendments arose neither from the specific worker protections nor from the mechanism for enforcing them. Rather it concerned uncertainties about how FLCRA applied to fixed-situs employers (such as farmers, orchard owners and food processors) as distinguished from the more transient traditional crew leaders. The 1974 Amendments had broadened the definition of "farm labor contractor" to include not only traditional transient crew leaders but also large numbers of fixed-situs employers. This created two related problems. First, the fixed-situs employers bitterly resented the bureaucratic burdens of registering as farm labor contractors and being fingerprinted "as if they were crewleaders with no fixed addresses or financial integrity." *Hearing on the Migrant and Seasonal Agricultural Worker Protection Act: Hearing on H.R.7102*

Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, 97th Cong., 2d Sess. 44 (1982) (statement of Robert Collyer, Deputy Under Secretary of Labor) ("*1982 House Hearing*"). *See also* H.R.Rep. No. 885, 97th Cong., 2d Sess. 3-4 (1982) ("1982 H.R.Rep."). Second, the controversy over registration of fixed-situs employers caused Labor Department enforcement of FLCRA to become bogged down in the pursuit of technical registration violations against fixed-situs employers and in litigation over the breadth of the definition of "farm labor contractor." 1982 H.R.Rep. at 2; *1982 House Hearing* at 50 (statement of Robert Collyer, Deputy Under Secretary of Labor).[7] Migrant worker advocates and agricultural employer representatives alike lambasted the Department of Labor for squandering its enforcement resources on technical registration violations that did not threaten significant harm to migrant workers.[8]

To redress these problems, Congress enacted the Migrant and Seasonal Agricultural Worker Protection Act, Pub.L.No. 97-470, 96 Stat. 2584 (1983) (codified at 29 U.S.C. §§ 1801-1872) ("AWPA"). Although AWPA repealed FLCRA in its entirety, *see* 1982 H.R.Rep. at 34, in most respects the statute

[7] In both the House committee report and the Labor Department's testimony, all of the examples offered to illustrate FLCRA's defects relate either to (1) controversy over which employers were required to register as labor contractors or (2) inadequate enforcement of FLCRA's substantive protections of migrant workers by a Labor Department preoccupied with registration controversies. 1982 H.R.Rep. at 3-4; *1982 House Hearing* at 44-45 (statement of Robert Collyer).

[8] The National Council of Agricultural Employers, one of petitioner's *amici* here, testified that "[c]ountless citations have been issued . . . and law suits filed over technical violations, almost none of which dealt with actual 'damage' to agricultural workers." *1982 House Hearing* at 58 (statement of Perry Ellsworth). Farmworker advocates complained that the Department "has focused on minor violations of the law instead of on workers whose rights under FLCRA have been seriously violated. The relief which the Department has obtained has rarely compensated injured farmworkers, or caused those responsible to bring their activities into compliance with the law." *Id.* at 63 (statement of Garry Bryant, formerly of the Migrant Legal Action Program). *See also* 128 Cong.Rec. 24,091 (1982) (statement of Sen. Hatch, sponsor of the reform bill). Violations of registration requirements must not be confused with violations of the record-keeping, disclosure, housing and transportation standards that aim to prevent injury to (or exploitaton of) farmworkers and that are, therefore, the very heart of the federal program.

was simply renamed and re-enacted.[9] The only sense in which AWPA took a "completely new approach" to the farmworker problem, 1982 H.R. Rep. at 3, was in abandoning FLCRA's attempt to police all conduct toward migrant or seasonal farmworkers through the single locus of the often transient crew leader (and FLCRA's consequent tendency to force all those who make use of such labor into that single, ill-fitting mold of "farm labor contractor"). Thus, AWPA reclassified fixed-situs employers as "agricultural employers" or "agricultural associations" and made them directly responsible for compliance with the Act's substantive worker protections, while liberating such employers from the indignities and bureaucratic burdens of registering as transient "farm labor contractors." 1982 H.R. Rep. at 5-9. AWPA's substantive safeguards of migrant worker safety and rights are virtually identical to those under FLCRA.

In re-enacting FLCRA's private right of action in AWPA, 29 U.S.C. § 1854, Congress preserved the special jurisdictional status of the cause of action (no amount in controversy requirement, no citizenship or diversity requirements, no exhaustion of any administrative remedies), its authorization for court-appointed plaintiff attorneys, and its provision for awards of full "actual damages," *see* § 1854 (a), (b) & (c)(1), while making clear the new congressional enforcement priorities. Senator Hatch, who introduced AWPA in the Senate, explained:

> Currently, FLCRA exposes employers to substantial monetary awards for highly technical violations, especially those related to registration status, when there may be very little damages. Where an intentional violation of the act has been committed, the

[9] Hence the Department of Labor characterized AWPA as merely a "revised farm labor statute" aimed at "clarifying the current statute." *1982 House Hearing* at 49, 50 (statement of Robert Collyer). The Courts of Appeals have concurred and uniformly looked to FLCRA as part of AWPA's legislative history. *See, e.g., Bresgal* v. *Brock*, 843 F.2d 1163, 1165 (9th Cir. 1988); *Bueno* v. *Mattner*, 829 F.2d 1380 (6th Cir. 1987), *cert. denied*, 108 S.Ct. 1994 (1988); *Almendarez* v. *Barrett-Fisher Co.*, 762 F.2d 1275, 1280 n.2 (5th Cir. 1985).

> bill would allow courts to award up to $500 per plaintiff, per violation, as statutory damages in a private lawsuit with an upper limit of $500,000 for a class action. There is no limit on the amount of actual damages that can be awarded by a court.

128 Cong.Rec. 32,463 (1982). *See also 1982 House Hearing* at 49 (statement of Robert Collyer, Deputy Under Secretary of Labor) ("It is our basic intent to . . . retain[ ] full access to the federal courts by injured private parties . . . [T]here is no limit on the amount of actual damages that can be awarded by a court."); 1982 H.R.Rep. at 21 (same). Multiple infractions of a single provision of AWPA or a regulation thereunder constitute but a single violation for purposes of determining statutory damages, § 1854(c)(1)(A), but, as Senator Hatch emphasized, "I want to make absolutely clear, however, that as I have stated earlier, *full actual damages would be awarded in every case*." 128 Cong.Rec. 32,463 (1982) (emphasis added).

This private right of action was re-enacted in the face of vigorous protests by farm and orchard employers that imposing liability under § 1854 was "harsh[ ]," "oppressive[ ]," and "even more objectionable" than subjecting such employers to civil and criminal penalties administered by the Department of Labor. *1982 House Hearing* at 176 (statement of Russell Williams, President, Agricultural Producers). Congress overruled these objections and made § 1854 the centerpiece of AWPA's enforcement regime. As AWPA's co-sponsor in the House explained:

> It has long been apparent that neither volunteerism on the part of agribusiness nor the puny enforcement efforts of the Department of Labor can be expected to make a significant difference in the working conditions of farmworkers. Like the FLCRA, the AWPA provides for a private right of action and holds out the prospect of large damage awards against agricultural employers who mistreat their workers. This, I

> am sure, will prove to be the most important deterrent against the continued abuse of migrant and seasonal farmworkers. As budget cuts undermine the Federal Government's ability to enforce the law, farmworkers will depend increasingly on the private bar and legal services organizations to insure that violators are punished and that they are made whole for their losses and suffering.

128 Cong.Rec. H10456 (daily ed. Dec. 20, 1982) (statement of Rep. Ford).

In order to guarantee that injured workers would not be left entirely in the lurch by judgment-proof labor contractors or farm employers, Congress mandated under Title IV of AWPA (codified at 29 U.S.C. § 1841(b)(1)(C)) that vehicles used to transport farmworkers be covered by a level of insurance in "at least the amount currently required for common carriers under part II of the Interstate Commerce Act." 1982 H.R.Rep. at 20. However, in those situations in which workers are "covered by State workers' compensation no additional insurance for damages to persons need be obtained." *Id*. This proviso addresses solely the level of liability insurance that farm employers are legally required to carry by Title IV of AWPA; it does not bear on whatever level of additional coverage may be advisable to insure employers against liability under the private cause of action created by Title V. On the very next page, where the House Report turns to its explication of AWPA's private civil remedy, Congress makes plain that a federal court may award an injured worker "an amount equal to his actual damages where there is no dollar limit . . . . The Committee's intent is . . . to insure full access to the Federal courts by injured private parties." 1982 H.R.Rep. at 21.

5. *Department of Labor Regulation 500.122(b)*

The Department of Labor received harsh criticism from both Congress and farm employer representatives for its sloth in promulgating regulations to implement FLCRA. *See, e.g.*,

Oversight Hearings on the Farm Labor Contractor Registration Act: Hearings Before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 10 (1975) (statement of Rep. McFall); *id.* at 81 (letter of the National Council of Agricultural Employers) ("*1975 Oversight Hearings*"). As late as 1978, four years after FLCRA's enactment, the Department confessed that it had still not issued an interpretive bulletin to inform farm contractors and employers of their duties under the law. *1978 House Hearings* at 67 (statement of Donald Elisburg, Assistant Secretary of Labor).

To preclude a similar performance under AWPA, Congress expressly directed the Department of Labor to promulgate appropriate implementing regulations no later than the effective date of the statute. 29 U.S.C. § 1841(d). AWPA became effective on April 14, 1983, and on April 12, 1983 the Department released interim regulations — dispensing, in its haste, with the practice of issuing proposed regulations. Comments on the immediately effective interim regulations had to be received within 30 days. *See* 48 Fed. Reg. 15800 (April 12, 1983).

Among the more than two hundred regulations promulgated under AWPA on April 12, 1983, was 29 C.F.R. § 500.122, entitled "Adjustments in insurance requirements when workers' compensation coverage is provided under State law," and issued, as that title indicates, to implement 29 U.S.C. § 1841(c) pursuant to the Secretary's authority under § 1841(d). *See* Appendix to Petition for Certiorari ("CPA") 32a-33a. Sandwiched between paragraphs actually dealing, as the title of the regulation represented, with adjustments in insurance coverage, the Department of Labor inserted a proviso purporting to strip the federal courts of the remedial jurisdiction granted by § 1854, AWPA's private cause of action:

> Where a State workers' compensation law is applicable and coverage is provided for a[n] . . . agricultural worker by the employer, the workers' compensation benefits are the exclusive remedy for loss under this Act in the case of bodily injury or death.

29 C.F.R. § 500.122(b). CPA 36a. The Department provided no clue as to where in the federal code it found authority to withdraw the federal judicial remedies expressly granted to litigants by Congress in a private cause of action.[10] Since the Department of Labor has declined to defend its regulation by an appearance before this Court, the statutory authorization (if any) for the Department's assertion of legislative power remains a mystery.

B. The Proceedings Below

On May 8, 1985, the respondents, ten farmworkers employed by petitioner Adams Fruit Company, were injured in Florida when the overloaded Adams Fruit van in which they were traveling suffered a tire blowout, crashed and overturned. Many of the respondents are permanently disabled as a result of the accident and unable to work. *See* Complaint, Joint Appendix ("JA") 2. Respondents alleged that their injuries were attributable in part to or were exacerbated by several intentional violations of AWPA safety standards. *Id.* at 2-3, 7-9.

Respondents applied for and received payments for medical treatment and for lost wages pursuant to Florida's Workers' Compensation Act.[11] Respondents then filed this suit under 29 U.S.C. § 1854, seeking actual or statutory damages and an order enjoining Adams Fruit from future violations of AWPA's vehicle safety standards. JA 9.

The District Court granted summary judgment for defendant on respondents' claims for statutory damages, actual damages

[10] It is impossible to know whether anyone noticed this remarkable subsection lurking in the interim regulations or whether the Department of Labor received any comments objecting to it, because the comments on § 500.122(b) have, according to the Department, been lost. The Director of Farm Labor Programs in the Department's Wage and Hour Division informed counsel for respondents by telephone that the comments appear to have been lost in the shuffle during the several moves the Division has made since 1983.

[11] As petitioner notes, Petitioner's Brief ("PB") 19 n.5, several of the respondents obtained relief against the manufacturer of the defective tire that occasioned the accident. Pursuant to Fla.Stat. § 440.39(3)(a), they have been required to reimburse the workers' compensation insurance carrier from their tort suit recovery for all benefits received under that state program.

and injunctive relief, on the ground that all such relief, both legal and equitable, is barred by the exclusive remedy provision of Florida's Workers' Compensation Act, Fla. Stat. § 440.11, in conjunction with 29 U.S.C. § 1841(c)(1). CPA 16a-19a. The United States Court of Appeals for the Eleventh Circuit reversed and remanded for trial. This Court granted a writ of certiorari.

SUMMARY OF ARGUMENT

Although this might appear to be a case about federal pre-emption, it differs from most pre-emption cases in one striking respect: the question presented is *not* whether a purportedly controlling provision of state law should be disregarded because Congress meant to occupy the field. The question posed here is, rather, whether an expressly controlling provision of *federal* law — one regulating the jurisdiction of the federal courts — should be disregarded in view of a state's internal division of authority, over a related subject, between its courts and its agencies.

That controlling federal provision is a private cause of action explicitly created by Congress in 29 U.S.C. § 1854 for migrant and seasonal farmworkers and their families. Nothing in this law's text or its history remotely supports petitioner's novel argument that the federal jurisdiction conferred thereby to remedy intentional violations of federal safety standards may be ousted — in a truly unprecedented form of *reverse pre-emption* engineered not by Congress but by a Labor Department regulation — on the basis of a state's decision to replace that state's *own* court-enforced tort remedies for injured migrant workers with an administrative regime of no-fault workers' compensation.

This Court's precedents make clear that no federal "incorporation" of state law jurisdiction-stripping provisions, escalating them into provisions purporting to oust *federal* courts of remedial power, is to be presumed from Congress' silence.

Applying any such presumption to a state workers' compensation scheme would be uniquely inappropriate in construing an

Act of Congress that elsewhere (1) expressly relieves agricultural employers covered by such a state scheme from the *duty to purchase additional insurance* to cover farmworker transportation (§ 1841(c)) while saying *nothing at all* about exempting such employers from the private suits created by the Act; but (2) does expressly exempt from all suits one category of potential defendants — namely, "labor organizations" as "defined under applicable State labor relations law" (§ 1803(a)(3)(B)).

The fact that Congress explicitly provided that this protective federal statute "is intended to *supplement* state law" rather than to "excuse any person from compliance with appropriate State law" (§ 1871) (emphasis added) undermines petitioner's claim that Congress wanted compliance with state law to excuse a federal defendant from full accountability to federal standards in a federal suit expressly authorized by the Act. Clearly, a directive by Congress that its statute sets a protective *floor* rather than a pre-emptive *ceiling* cannot be read to suspend the normal operation of the Constitution's Supremacy Clause, which precludes giving state law an effect that directly conflicts with an applicable federal statute.

Remarkably, over a decade ago Congress *specifically rejected* the precise workers' compensation exclusivity defense that petitioner would have this Court engraft onto Congress' statute, either on the Court's own authority or out of deference to a six-year-old Department of Labor regulation that the United States pointedly *has not defended* in this litigation.

When Congress, unsatisfied with Labor's enforcement of federal safety requirements for the transportation and housing of migrant workers and their families, created a private cause of action for such individuals (§ 1854) and endowed the Department of Labor with authority to prescribe standards for vehicle safety and for vehicle insurance coverage (§ 1841(d)), it cannot be said to have delegated to the Department the quintessentially lawmaking power to enact a provision (§ 500.122(b)) that would eliminate the very cause of action Congress had legislated, remitting migrants to the very schemes of state workers' compensation that Congress had examined and found wanting.

It is hardly surprising that neither the Department of Labor nor the Department of Justice joins petitioner in urging this

Court to give effect to this free-floating executive usurpation of national legislative power. Where, as here, Congress has left no gap for the Executive Branch to fill and no ambiguity for the Executive to resolve, the separation of powers leaves no room for "deference" to a departmentally crafted court-stripping measure of the sort petitioner (but, notably, not even the State of Florida itself) attributes to Florida law in this case.

ARGUMENT

I. NOTHING IN FEDERAL LAW PERMITS THE DISMISSAL OF § 1854's CONGRESSIONALLY CREATED PRIVATE CAUSE OF ACTION ON THE BASIS OF A STATE'S DECISION TO DISPLACE ITS OWN COMMON LAW TORT REMEDIES WITH A REGIME OF WORKERS' COMPENSATION.

A. The Language And Legislative History Of § 1854 Mandate Rejection Of Petitioner's Proposed Workers' Compensation Defense To Private Civil Liability Under AWPA.

Since 29 U.S.C. § 1854 is the place where Congress sets forth the private right of action under which respondents have sued, an understanding of § 1854 is essential to this case — although petitioner and its *amici* resolutely ignore it.

Section 1854 creates a private right of action for "[a]ny person aggrieved by a violation of [AWPA]," § 1854(a), and specifies the available relief in exacting detail. There is a cap of $500 per plaintiff per violation for awards of statutory damages, a cap of $500,000 for total statutory damages in a class action, and a limit on cumulating multiple infractions of a single statutory provision for the purposes of awarding statutory damages. § 1854(c)(1)(A) & (B). In determining the amount of damages, the district court is expressly authorized "to consider whether an attempt was made to resolve the issues in dispute before the resort to litigation." § 1854(c)(2). But there is not a single word even remotely suggesting that state workers' compensation laws impose an additional cap on damages or otherwise affect the award of relief under AWPA in any way. Indeed, the statute negates such an interpretation by expressly providing that the court "may award damages up to and including an amount equal to the amount of actual damages," § 1854 (c)(1).

The legislative history of § 1854 — which petitioner and its *amici* do not pause to discuss — confirms that Congress did not contemplate any limits on damages under AWPA other than those delineated in § 1854. *See supra* pp. 3-4, 9-11. Senator Hatch, who introduced the bill, went out of his way to reiterate that "*full actual damages would be awarded in every case*." 128 Cong.Rec. 32,463 (1982) (emphasis added). AWPA's private right of action was enacted in the face of stiff opposition from agricultural employers, *see supra* p. 10, because of Congress' conviction that only "the prospect of large damage awards against agricultural employers" under § 1854 could achieve the twin goals of punishing violations of AWPA and ensuring that farmworkers "are made whole for their losses and suffering." 128 Cong.Rec. H10456 (daily ed. Dec. 20, 1982) (statement of co-sponsor Rep. Ford).

B. There Is No Support In The Text Or History Of AWPA For Petitioner's Argument That Congress, By Its Silence On The Issue, Incorporated The Whole of State Workers' Compensation Law Into AWPA.

1. *State workers' compensation law is irrelevant to this federal cause of action.*

Petitioner contends that, despite the plain language of § 1854, respondents are barred from suing for damages for bodily injury under AWPA by virtue of the exclusive remedy provision of the Florida Worker' Compensation Statute, Fla.Stat. § 440.11 (CPA 37a). On its face, that provision has no bearing on this federal lawsuit. The decision of the Florida legislature to displace *its own* state law tort remedies for injured employees with a regime of no-fault workers' compensation does not even purport to affect the availability of remedies

provided by *other sovereigns or other jurisdictions* for the same injuries covered by the Florida law.[12] In general, such an exclusivity provision, whether in a federal or state statute, does not bar additional recovery for the same injury under the tort remedies or workers' compensation scheme of another jurisdiction. *See Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 722 n.4 (1980) (noting that this Court has never construed the exclusive remedy provision of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(a), "to

[12] Unlike *United States* v. *Demko*, 385 U.S. 149 (1966), on which petitioner relies so heavily, PB 6, 18, this case involves no need to reconcile two competing compensation schemes of a single jurisdiction. *Demko* held that 18 U.S.C. § 4126 was the exclusive means of recovery for an injured federal prisoner who brought suit under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346, after having received benefits under a § 4126 claim. Noting that "compensation laws are practically always thought of as substitutes for . . . common-law tort actions," the *Demko* Court held that Congress' own tailor-made compensation scheme (§ 4126) displaced Congress' general incorporation of state common law torts (FTCA): "where 'the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect.'" 385 U.S. at 151 (citation omitted).

In any event, it is plain that Congress meant AWPA, unlike the FTCA, to exist alongside other remedial schemes, for Congress expressly enacted AWPA "to supplement State law." 29 U.S.C. § 1871. CPA 35a. Nothing in the text or legislative history of the FTCA had indicated a congressional purpose to "supplement[ ]" recovery under § 4126. *Demko*, 385 U.S. at 153, 152.

Moreover, AWPA is not a common law tort regime of the sort held to have been displaced in *Demko*. It is instead a specialized statutory regime for regulating the employment and treatment of migrant farmworkers, whose aim is not only compensation but also the enforcement of an elaborate framework of working, housing and transportation standards.

Finally, *Demko* was nothing more than a straightforward application of the rule that "persons for whom the Government has supplied an administrative compensation remedy are precluded from seeking recovery *against the United States* for injuries received in the course of their work under" various other federal remedial statutes such as the FTCA and the Jones Act. 385 U.S. at 151 n.4 (emphasis added). In contrast, successive recovery under both a state workers' compensation regime and, for example, the Jones Act is not barred where the injured party was not employed by and is not seeking recovery from the federal government. *See, e.g., Thibodeaux* v. *Atlantic Richfield Co.*, 580 F.2d 841, 847 (5th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979); *Roberts* v. *City of Plantation*, 558 F.2d 750, 751 (5th Cir. 1977). This case, of course, involves neither an action against the federal government as an employer nor the existence of an overlapping federal compensation regime.

Petitioners also rely on *Roman* v. *Sunny Slope Farms, Inc.*, 817 F.2d 1116 (4th Cir. 1987), *cert. denied*, 108 S.Ct. 163 (1987). PB 6. But *Roman* was predicated on a misapplication of *Demko*, *see* 817 F.2d at 1119-20, and was thus wrongly decided. It is therefore of no help to petitioner.

exclude remedies offered by other jurisdictions."); *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261, 279-80 (1980) (upholding consecutive recovery under two states' workers' compensation systems despite exclusivity provision); *id.* at 275-76 & n.21 (collecting state cases allowing double recovery); *Carroll* v. *Lanza*, 349 U.S. 408 (1955) (upholding recovery under common law tort action in second state despite exclusivity provision in first state's workers' compensation system); *de Cancino* v. *Eastern Air Lines*, 239 So.2d 15, 17 (Fla.S.Ct. 1970) (Florida workers' compensation scheme allows injured party "to seek recovery in more than one state"; the "only pertinence which compensation proceedings in another state may have is concerned with offsetting the amount of benefits received").

And in particular, the rules relevant to "'enforcing a right created by [a] State are hardly relevant for determining the rules which bar enforcement of a right created not by a State legislature but by Congress.'" *DelCostello* v. *Int'l Brotherhood of Teamsters*, 462 U.S. 151, 160 n.13 (1983) (citation, brackets and ellipsis omitted). AWPA "provides a federal cause of action, and the scope of the remedy as well as the substance of the rights created thereby is a matter of federal not state law." *F.D.Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116, 127 (1974). "If plaintiff can prove himself entitled to [federal statutory] recovery, the exclusive remedy provisions of Florida's workmen's compensation statutes cannot oust the federal court of its jurisdiction." *Roberts* v. *City of Plantation*, 558 F.2d 750, 751 (5th Cir. 1977).

2. *Petitioner's "incorporation" analysis is insupportable.*

Apparently recognizing that the damages recoverable and the substantive defenses available under § 1854 are entirely creatures of federal rather than state law, petitioner and its *amici* contend that the Florida exclusivity provision nevertheless governs this case because Congress has *incorporated* it into AWPA. This is the crux of their entire argument. *See* PB 17, 18, 24; Brief Amicus Curiae of the California Workers' Com-

pensation Institute ("CWCI Br.") 12; Brief Amicus Curiae of the American Farm Bureau Federation, *et al.* ("AFBF Br.") 18.

But "in the absence of a plain indication to the contrary," the presumption is that Congress does *not* intend to "incorporate" state law into federal statutes. *Jerome* v. *United States*, 318 U.S. 101, 104 (1943). *See also United States* v. *Turley*, 352 U.S. 407, 411 (1957). Petitioner has utterly failed to establish *any* indication, much less a "plain" one, of congressional intent to incorporate this provision. Indeed, petitioner does not even attempt to meet this standard of statutory interpretation, preferring instead to pioneer a truly alarming theory of federal incorporation of state law.

Petitioner offers the following shaky syllogism: (A) Section 1841(c) of AWPA provides that agricultural employers who are covered by state workers' compensation law need not purchase additional insurance to cover the transportation of farmworkers. PB 16. (B) "Congress was well aware of workers' compensation laws [sic] exclusivity provisions," and "if Congress intended AWPA to pre-empt workers' compensation, the text of AWPA could have expressly pre-empted state law." PB 17. (C) Therefore, AWPA's "silence on this point is significant and creates the assumption that state workers' compensation law, in its entirety, is incorporated into the statute." PB 17.

This argument disintegrates at every step. *First*, § 1841(c), as its very title reveals, concerns only "Adjustments of insurance requirements in event of workers' compensation coverage." PB 16; CPA 32a. The most it purports to do is to "adjust" the employer's obligation to comply with "the requirements of subsection (b)(1)(C) of this section relating to having an insurance policy or liability bond," § 1841(c). CPA 32a-33a. Section 1841(c) is *administrative*, not *remedial*. It deals with the amount and type of *insurance* that employers are required by § 1841(b) to carry, not with the nature and extent of employer *liability* under § 1854's private right of action. It establishes a floor of minimum insurance coverage, not a ceiling of maximum damage recovery. In short, § 1841(c) has nothing

at all to do with the affirmative defenses to AWPA liability that might be available to an employer sued under § 1854.[13]

Second, the fact that Congress was aware of workers' compensation exclusivity provisions and nonetheless chose not to refer to them in § 1841(c) or in any other part of AWPA suggests the exact opposite of incorporation. Congress certainly knows how to incorporate such exclusivity provisions (and the affirmative defense they entail) into a federal civil claim, and has done so elsewhere. The Federal Tort Claims Act, by providing that the United States is liable to suit only to the same extent as a private individual under like circumstances would be under the law of the state where the tort occurred, *see* 28 U.S.C. § 1346(b), incorporates workers' compensation exclusivity into federal law and enables the federal government to invoke it as a defense to liability. *Griffin* v. *United States*, 644 F.2d 846, 847-48 (10th Cir. 1981).

Congress similarly knows how to subordinate recovery under a federal relief program for particular workers to state workers' compensation benefits, and it has done so (where it wished) in unmistakable language. The War Hazard Compensation Act provides a federal avenue to redress "war-risk" injuries only in those cases where the worker has not received state workers' compensation.[14] And the Black Lung Benefits Act expressly integrates federal and state compensation systems, not just minimum insurance requirements, by providing that in states where the Secretary of Labor finds "adequate compensation," 30 U.S.C. § 931(b), a worker's federal avenue for benefits evaporates and his claim "shall be filed pursuant to the applicable State workmen's compensation law," *id.* at § 931(a). There are no such provisions in AWPA because Congress did not intend to subordinate federal recovery under § 1854 to myriad state workers' compensation programs.

[13] Petitioner raised the exclusivity of workers' compensation as its third and fourth affirmative defenses in its Answer to respondents' Complaint. JA 15-16.

[14] 42 U.S.C. § 1705 provides: "No benefits shall be paid or furnished under the provisions of this subchapter for injury or death to any person who recovers or receives workmen's compensation benefits for the same injury or death under . . . the law of any State, territory, possession, foreign country or other jurisdiction." Under § 1705(b), the Secretary has a lien and right of recovery against benefits payable under any other workers' compensation system.

Congress also knows how to incorporate state law into AWPA so as to shield a class of parties from § 1854 liability, and has done so elsewhere. *See, e.g.*, 29 U.S.C. § 1803(a)(3)(B) (fully exempting from AWPA "labor organization[s]" as defined in federal law "or as defined under applicable State labor relations law"). Congress' omission to do likewise with respect to workers' compensation exclusivity provisions is telling.

Third, petitioner gets it exactly backwards when arguing that some discrete congressional references to state law demonstrate congressional intent to work no other displacement of state law. (PB 17). "Although Congress made decisions about the applicability of certain aspects of state law . . . these provisions do not imply that Congress intended no further pre-emption of state law." *Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 162 (1982). To be sure, as petitioner notes, "the text of AWPA *could* have expressly pre-empted state law," PB 17 (emphasis added); but there is no requirement that Congress restate the obvious — that, under the Supremacy Clause of Article VI, federal law displaces any squarely conflicting state law. Express pre-emption is but one avenue of displacing state law: "where Congress has not completely displaced state regulation, federal law may nonetheless pre-empt state law to the extent it *actually conflicts* with the federal law." *California Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 280-81 (1987) (emphasis added).

No fancy pre-emption analysis is needed in this case. Since exclusivity provisions such as Florida's are generally treated as wholly inapplicable to remedies created by other jurisdictions, *see supra* pp. 18-19, there is no need to accuse Florida of meaning to create a conflict with AWPA's private right of action. And, even if Florida *were* spoiling for a fight with the Federal Government, the best course would be the one this Court unanimously navigated in *Sun Ship*: "if federal preclusion ever need be implied to cope with this remote contingency, a less disruptive approach would be to pre-empt the state compensation exclusivity clause, rather than to pre-empt the entire state compensation statute," 447 U.S. at 724 n.6 (dictum).

Fourth, and finally, we come to petitioner's claim that AWPA's "silence" on the issue of exclusivity, after having referred in § 1841(c) to insurance policies under workers' compensation, "creates the assumption that state workers' compensation law, *in its entirety*, is incorporated into the statute." PB 17 (emphasis added). This is nonsense. As this Court explained in *de la Cuesta*, if federal law "were expected to conform to state law except where explicitly pre-empted in the Act itself, the provisions incorporating specific aspects of state law were needlessly repetitive. We decline to construe the Act so as to render these provisions nugatory," 458 U.S. at 163.

More importantly, the rule of statutory construction urged by petitioner and its *amici* would wreak havoc with judicial interpretation of federal enactments. Whenever Congress revealed its awareness of a state statutory or regulatory regime by adverting to it in a federal statute in any respect, no matter how minor, and then did not expressly pre-empt all the remaining provisions of that state regime, this corpus of state law would, under petitioner's theory, be deemed to have been "incorporated" into federal law "in its entirety"! In a single stroke, petitioner would turn both the doctrine of conflict pre-emption and the law of federal statutory incorporation on their heads.

3. *Section 1871 undermines petitioner's analysis.*

Petitioner's bizarre incorporation theory gains nothing from 29 U.S.C. § 1871, where Congress provided that AWPA "is intended to supplement State law, and compliance with this chapter shall not excuse any person from compliance with appropriate State law and regulation." CPA 35a. Petitioner and its *amici* implausibly read "supplement" to negate any congressional intent to displace even a *conflicting* state law provision. PB 7, 15; AFBF Br. 19; CWCI Br. 10. Petitioner's own authority for this reading demonstrates how untenable it is. PB 15-16. In *DeCanas* v. *Bica*, 424 U.S. 351 (1976), which concerned the virtually identical "supplement" proviso

of AWPA's predecessor statute, FLCRA, this Court explained that this proviso negated pre-emption by means of *federal occupation of the field*, but left open the question whether the state law at issue there "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'. . . ." *Id.* at 363 (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). But no "occupation of the field" is being suggested here. If the Florida exclusivity provision were applicable by its own terms to the federal remedies provided by § 1854 — which it is not — the pre-emption of that provision, as the Court of Appeals held below, CPA 4a-5a & n.1, would follow from its "actual conflict" with § 1854. And pre-emption of that sort has nothing to do with whether AWPA *supplements* state law or *replaces* it, the only issue to which § 1871 purports to speak.[15]

Indeed, § 1871 supports respondents, not petitioner. The second clause of the provision, which petitioner overlooks, states that "compliance with [AWPA] shall not excuse any person from compliance with appropriate State law and regulation." The most natural reading of § 1871 is that it was written to allow states leeway to provide *additional* or *greater* protection for farmworkers. This section has remained unchanged throughout a quarter-century of federal farmworker legislation. *See* 1963 S.Rep. at 7 (FLCRA); 1974 H.R.Rep. at 21 (FLCRA amendments); 1982 H.R.Rep. at 33 (AWPA). Congress' intent has always been to prevent federal legislation from inadvertently obliterating consistent (or even more stringent) state law protections for migrant and seasonal workers. *See 1973 House Hearings* at 158 (statement of Rep. Ford). To paraphrase this Court in *Guerra*, Congress intended AWPA to be a floor beneath which farmworker protections may not drop — not a ceiling above which they may not rise. 479 U.S. at 285.[16]

[15] This same analysis compels the conclusion, reached by the court below, CPA 5a n.1, that *Roman* v. *Sunny Slope Farms*, 817 F.2d at 1118-19, was wrongly decided because the Court of Appeals for the Fourth Circuit misread § 1871.

[16] For example, on September 15, 1989, California enacted amendments to its labor code that go beyond AWPA in outlawing and punishing labor contractor misrepresentations. Cal.Labor Code § 1697.1. The private right of action thereunder is arguably even more potent than § 1854 of AWPA, for it provides for actual damages, equitable relief, and punitive damages in an amount equal to three times the sum of actual damages awarded. § 1697.1(c). California law also mandates stiff record-keeping requirements and provides that they are *in addition* to those of AWPA. § 1695.5(c).

Therefore, § 1871 cannot be invoked to infuse Florida's exclusivity provision with the force of federal law. Indeed, the exclusive remedy provision of Fla.Stat. § 440.11 is not something with which, under § 1871, any private actor *could* fail to "comply," since it does not govern conduct but merely sets out legal rights under state law. And as for respondents, in their § 1854 cause of action they have not failed to "compl[y] with appropriate state law," but have simply sought to remedy *petitioner's* intentional *non*-compliance with *federal* law.

4. *Congress has already rejected the precise workers' compensation exclusivity defense that petitioner seeks from this Court.*

Even if petitioner's unprecedented theory of federal incorporation of state law were less threatening to this Court's long-settled doctrines, the notion that AWPA incorporates state exclusivity provisions would nevertheless have to be rejected. For the legislative history reveals that such provisions were in fact anathema to Congress; that is why Congress in 1978 rejected the Ireland Amendment, which — as petitioner and its *amici* candidly describe it — "would have explicitly recognized that state workers' compensation benefits were the exclusive remedy for bodily injuries to covered employees." AFBF Br. 22. *See also* PB 28-29 & n.6 ("Congress rejected an amendment to incorporate workers' compensation into FLCRA in 1978"; the Ireland Amendment "would provide that the workers' compensation would be exclusive, if applicable."). *See supra* pp. 5-7.

There is no other reference to state exclusivity provisions in the legislative history of AWPA, either before or after 1978. Consequently, to make their case for a state-law exclusivity defense to employer liability under § 1854, petitioner and its

amici forsake § 1854 and the actual text of AWPA altogether, relying solely on the legislative history of § 1841(c). And even with respect to that largely irrelevant section from a different part of the statute, they have unearthed only one supposedly pertinent scrap of history, which they adduce again and again. PB 8, 10, 14, 31; AFBF Br. 15, 18, 24. Page 20 of the 1982 House Report on AWPA describes § 1841(c) as providing that "in those situations where agricultural workers are transported and are covered by State workers' compensation no additional insurance for damage to persons need be obtained." Petitioner and its supporters read this as an assurance to farm employers that they need not take out any additional insurance because workers' compensation is the limit of their personal injury liability exposure under AWPA. They are mistaken.

As previously explained, *supra* pp. 11, 20-21, § 1841(c) pertains solely to the level of liability insurance that farm employers are *legally required* to carry by Title IV of AWPA, and not to whatever level of additional coverage they may deem advisable (according to their independent business judgment) to insure against liability under the private cause of action created by Title V. The extent of civil liability under § 1854 of AWPA is discussed on the following page of the House Report: "Where an intentional violation [of AWPA standards] has been committed, the Act permits a farmworker to recover either an amount equal to his *actual damages where there is no dollar limit* or statutory damages of up to $500.00 per plaintiff for each violation of a single provision with an upper limit of $500,000 for a class action." 1982 H.R.Rep. at 21 (emphasis added).

There is no mention of a workers' compensation exclusivity defense that would oust farmworkers from a federal court, as respondents were ousted from the district court below. Indeed, the Report unambiguously declares that "The Committee's intent is . . . to insure full access to the Federal courts by injured private parties." *Id.* Yet petitioner now asks this Court to approve such a defense in order to deny respondents' statutory and actual damages as well as injunctive relief — in manifest frustration of Congress' deliberate plan to use § 1854's

private right of action to enforce AWPA's safeguards and to make injured farmworkers whole. Especially since the benefits available under workers' compensation were consistently criticized by Congress and the Department of Labor as inadequate to justify exclusivity, *see supra* pp. 4, 6 & note 5, it makes absolutely no sense to say that Congress meant to (silently) incorporate those same levels into AWPA.[17]

It is impossible to conclude in the face of this history that Congress, having rejected in 1978 an amendment incorporating state exclusivity provisions into federal law, wordlessly reversed itself in 1983 and, by indirection, enacted the exclusivity defense it had previously repudiated.[18]

Apparently recognizing the peril in which Congress' rejection of the Ireland Amendment places their "silent incorporation" argument, petitioner and its *amici* decline to meet it head-on. Because the Ireland Amendment involved FLCRA rather than AWPA, they dismiss it as the irrelevant legislative history of a different statute. PB 28-29; AFBF Br. 22. This argument is transparently unavailing. FLCRA was the predecessor statute to AWPA and this Court has long recognized the importance of understanding congressional intent as expressed over time in a series of related or successor statutes.[19] Petitioner tacitly acknowledges as much, since it relies on

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[17] Compare *United States* v. *Turley*, 352 U.S. at 414, 417, where this Court rejected the argument that restrictive state law definitions of a crime had been incorporated into federal law in the face of a House Report criticizing state laws as inadequate to cope with the auto theft problem.

[18] Compare *Jerome* v. *United States*, 318 U.S. at 105-06, where this Court wrote: "It is difficult to conclude in the face of this history that Congress, having rejected in 1934 an express provision making state felonies federal offenses, reversed itself in 1937, and, through the phrase 'any felony or larceny,' adopted the penal provisions of forty-eight states with respect to acts committed in national or insured banks. It is likewise difficult to believe that Congress, through the same clause, adopted by indirection in 1937 much of the fraud provision which it rejected in 1934."

[19] *See, e.g., Xerox Corporation* v. *County of Harris*, 459 U.S. 145, 150-53 (1982) (examining legislative history of the 1846 Warehousing Act because it was "[a] forerunner]" of contemporary bonded warehouse statutes); *Williams* v. *United States*, 327 U.S. 711, 719-24 (1946) (examining Federal Crimes Act of 1790 and successor statutes in order to illuminate congressional intent behind contemporary Assimilative Crimes Act).

DeCanas v. *Bica* to support its own reading of AWPA, even though that case was decided under FLCRA. PB 15.[20]

Petitioner and its *amici*[21] thus ask this Court for what Congress has already denied them. If Congress has previously rejected legislation aimed at giving a statute a desired effect, a statutory "interpretation" accomplishing the same end should be repudiated as especially suspect. It would be "improper for [this Court] to give a reading to the Act that Congress considered and rejected." *Pacific Gas & Electric Co.* v. *State Energy Resources Comm'n*, 461 U.S. 190, 220 (1983). *See also Hallstrom* v. *Tillamook County*, 58 U.S.L.W. 4007, 4009 (U.S. Nov. 7, 1989) ("we are not at liberty to create an exception [from a statute] where Congress has declined to do so.").

II. REGULATION 500.122(b), WHICH THE DEPARTMENT OF LABOR HAS NOT DEFENDED, PROVIDES NO SUPPORT FOR PETITIONER'S PROPOSED RE-WRITE OF § 1854.

Petitioner and its friends urge this Court to defer to the Department of Labor and accept the so-called "interpretation" of AWPA set forth in its 1983 regulation, 29 C.F.R. § 500.122 (b).[22] PB 24-28; AFBF Br. 10-19. All agree that the appropriate starting place for evaluating this plea for deference is *Chevron* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984):

[20] Although AWPA repealed FLCRA, AWPA was understood at that time by its drafters and subsequently by the courts interpreting it as largely a re-enactment of the earlier law. *See supra* pp. 8-9 & note 9. Moreover, the cause of action under which respondents have brought suit, now embodied in 29 U.S.C. § 1854, originated in the 1974 amendments to FLCRA. The only changes made in liability under this cause of action pertain to new limits on statutory damages, not actual damages, and in any event petitioner invokes the Florida exclusivity provision as an absolute bar to both — a position submitted to and rejected by Congress in 1978, largely on the ground that a workers' compensation regime was inadequate to satisfy the twin congressional goals of fully compensating injured farmworkers and vigorously deterring violations of federal law. *See supra* pp. 6-7.

[21] *Amicus* American Farm Bureau Federation testified in support of the Ireland Amendment in 1978. *1978 House Hearings* at 120, 123 (statement of C.H. Fields, AFBF).

[22] Regulation 500.122(b) provides: "Where a State workers' compensation law is applicable and coverage is provided for a migrant or seasonal agricultural worker by the employer, the workers' compensation benefits are the exclusive remedy for loss under this Act in the case of bodily injury or death."

> If the intent of Congress is clear, that is the end of the matter; . . . If, however, the court determines Congress has not directly addressed the precise question at issue, . . . [i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

467 U.S. at 842-44. *See also NLRB* v. *United Food & Commercial Workers Union*, 108 S.Ct. 413, 426-27 (1987) (Scalia, J., concurring) (under *Chevron*, deference to the agency's interpretation is appropriate when "'the statute is silent or ambiguous' with respect to an issue . . . committed to [the agency's] charge").

Here the intent of Congress could not be more clear. As demonstrated above, *see* pp. 16-17, Congress included several express limits on liability for statutory damages in § 1854, and elsewhere exempted some agricultural employers from AWPA altogether by specifically incorporating state law. But nowhere did Congress suggest that the existence of a state workers' compensation regime might bar relief for death or bodily injury under § 1854. The legislative history confirms congressional intent to assure full access to federal courts, awards of equitable relief and full actual damages without a dollar limit, and no requirement that alternative remedies be exhausted. Most dramatically, Congress in 1978 rejected an amendment that would have written petitioner's proposed exclusivity rule into federal law.

As might be expected, petitioner and its *amici* ignore the text of § 1854 and search for ambiguity elsewhere. They claim to have found it in § 1841(c).[23] But this section gets them no-

[23] Section 1841(c) provides: "Adjustments of insurance requirements in event of workers' compensation coverage: If an agricultural employer, agricultural association, or farm labor contractor is the employer of any migrant or seasonal agricultural worker for purposes of a State workers' compensation law and

where. The "[a]djustments of insurance requirements in event of workers' compensation coverage" called for in § 1841(c)'s title may well require some interstitial interpretation by the Department of Labor. That would justify such regulations as 29 C.F.R. § 500.122(c), which explains how an employer may demonstrate to the Department that he is eligible for this exception to the AWPA insurance policy requirement. But included along with such unexceptional regulations is this aberration, § 500.122(b), which has nothing to do with adjusting insurance requirements under § 1841 and everything to do with altering liability under § 1854.

Even if Congress' intent respecting AWPA's private right of action were unclear, the *Chevron* rule of deference would remain inapplicable to this case. For Congress has not "left a gap" in AWPA's civil remedy for the Secretary "to fill." *Chevron*, 467 U.S. at 843. Indeed, far from *filling* a gap in insurance requirements, Regulation 500.122(b) *creates* a gap both in enforcement and in compensation under AWPA by entirely eliminating the congressionally created private right of action for AWPA violations resulting in bodily injury in any state with an applicable workers' compensation program, however inadequate. Nor has there been an "express delegation of authority to the [Secretary] to elucidate" § 1854 "by regulation." *Chevron*, 467 U.S. at 843-44. Regulation 500.122(b) was issued pursuant to § 1841(d), which authorizes the Secretary to "prescribe the standards required for the purposes of implementing this section," which, according to its subtitles, deals with "Motor Vehicle Safety," (title of § 1841) and "Adjustments of insurance requirements," (title of § 1841(c)). CPA 33a. Thus both the language and the title of the section make § 1841(d)'s limited function — and the Secretary's limited au-

such employer provides workers' compensation coverage for such worker in the case of bodily injury or death as provided by such State law the following adjustments in the requirements of subsection (b)(1)(C) of this section relating to having an insurance policy or liability bond apply: (1) No insurance policy or liability bond shall be required of the employer, if such workers are transported only under circumstances for which there is coverage under such State law. (2) An insurance policy or liability bond shall be required of the employer for circumstances under which coverage for the transportation of such workers is not provided under such State law."

thority thereunder — quite clear. *Cf. Mead Corp.* v. *Tilley*, 109 S.Ct. 2156, 2162 (1989).[24]

Nor is this Court dealing with the Secretary's "construction of the statute which [he] administers," *Chevron*, 467 U.S. at 842, for he does not administer § 1854. That private civil remedy, unlike the supervision of employer insurance policies, and unlike the elaboration of detailed safety standards, has not been "committed to [the Secretary's] charge." *United Food & Commercial Workers*, 108 S.Ct. at 427 (Scalia, J., concurring).

Indeed, before entering the thicket of agency deference doctrine, this Court would be well advised to take two steps back and recall that what Regulation 500.122(b) purports to interpret and implement is not a scheme of administrative law at all, but a *"private right of action"*. § 1854 (title) (emphasis added). CPA 33a. As such, § 1854 is quite frankly none of the Secretary of Labor's business. Responsibility for "administering" or "implementing" this cause of action has been reposed in the Federal Judiciary, not in the Department of Labor. *Cf. Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456-57 (1957) (construing § 301 of the Labor Management Relations Act as a grant of authority to the federal courts to fashion a body of remedial

[24] "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen* v. *Georgetown University Hospital*, 109 S.Ct. 468, 471 (1988). A regulation must be set aside if it is "'in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.'" *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89, 97 n.7 (1983) (quoting 5 U.S.C. §§ 706(2)(A) & (C)). *See also Securities Industry Ass'n* v. *Federal Reserve Board*, 468 U.S. 137, 143 (1984) (courts "'must reject administrative constructions of [a] statute . . . that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement'") (citation omitted).

The generic, boilerplate grant of rulemaking power in § 186; (authorizing the Secretary to "issue such rules and regulations as are necessary to carry out this Act") obviously affords petitioner no solace, for it contains no express grant of authority to alter AWPA's private right of action. *Cf. Georgetown Hospital*, 109 S.Ct. at 474 ("The statutory provisions establishing the Secretary's general rulemaking power contain no express authorization of retroactive rulemaking."). Such an express grant of authority is required to justify agency action altering or setting aside the detailed regime set forth in a separate statutory provision that "directly address[es]" the particular subject in issue and "reflect[s] a specific set of congressional concerns." *Brae Corporation* v. *United States*, 740 F.2d 1023, 1059 (D.C.Cir. 1984), *cert. denied*, 471 U.S. 1069 (1985).

law). In fact, Congress effectively deputized farmworkers as private attorneys general under § 1854 in large part because Congress deemed the Labor Department's enforcement efforts to be inadequate and unreliable. *See supra* pp. 2-3, 10-11.[25] The presence in § 1854 of detailed provisions for the award of statutory damages up to a total of $500,000 in a class action, even when actual damages resulting from those same AWPA violations may be nominal, underscores the importance of this private right of action as a means of enforcing federal law. The suggestion that Congress nevertheless intended, by its delegation of standards-prescribing authority in § 1841(d), to grant the Labor Department discretion simply to eliminate the private enforcement mechanism of § 1854 is tantamount to an assertion that Congress put a not-entirely-reformed fox in complete charge of the henhouse. Surely that is unthinkable.

It is perhaps unsurprising, therefore, even if highly unusual, that the Department of Labor has chosen not to defend its regulation either in the Court of Appeals or before this Court, and that the Solicitor General has entered no appearance here.[26] There is thus a hollow ring to the cries that the Department's prerogatives have been disparaged and that the integrity of the administrative process has been violated. AFBF Br. 9-10.[27]

[25] As Representative Ford, co-sponsor of FLCRA and AWPA put it, "I have joined with others who have been extremely critical of the Labor Department for what they considered to be something less than adequate attention to the problems of migrant workers, and the refusal, in some instances, of the Labor Department to assert its jurisdiction . . . . We have used every device possible in this committee to prod, criticize and sometimes castigate the Labor Department to push for vigorous enforcement of the laws." *1975 Oversight Hearings* at 15.

[26] Contrast *Chevron*, where the Office of the Solicitor General not only defended the challenged regulation for the EPA but even presented the oral argument on behalf of petitioner Chevron.

[27] The Department's failure to defend its own regulation is far more significant and telling than is the supposed lack of objection to Regulation 500.122(b) when it was promulgated. *See* PB 25-26; AFBF Br. 9, 15. As to the latter, petitioner and its *amici* are engaging in rank speculation. Since the Department of Labor has long since lost the Notice and Comment file on this regulation, *see* note 10, *supra*, there is no way *to know* whether objections to § 500.122(b) were raised or not. In any event, given the hundreds of AWPA regulations proposed the same day as subsection 500.122(b), and the way in which it was squirreled away in a legitimate insurance regulation bearing an innocuous title, it is easy to see how § 500.122(b) could have been overlooked in the accelerated comment period.

Whatever the Department's reasons for declining to defend § 500.122(b), it remains the case that no deference is due its original decision to promulgate that regulation. When an executive agency consistently criticized by Congress for failing to enforce the law usurps lawmaking power in order to eviscerate the private cause of action Congress created to fill the enforcement void, its work cannot be described as a mere "bureaucratic success story." *Morrison v. Olson*, 108 S.Ct. 2597, 2615 (1988).

After all, § 1854 is not a controversial judicially-implied cause of action about which jurists may remain somewhat skeptical. Compare *Thompson* v. *Thompson*, 108 S.Ct. 513 (1988). It is an express right of action, modeled by Congress on the civil rights statutes. *See supra* p. 3. If the creation of a private federal right of action is a uniquely legislative task, *see Thompson*, 108 S.Ct. at 522-23 (Scalia, J., joined by O'Connor, J., concurring in the judgment); *Cannon* v. *University of Chicago*, 441 U.S. 677, 742-45, 749 (1979) (Powell, J., dissenting), then no other branch has any business suspending that right of action — particularly through the creation of state-law defenses that Congress has considered and rejected.[28] As this Court unanimously held in *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, "the 'deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.'" 464 U.S. at

[28] Indeed, even though the view that there is no place in our constitutional order for "a sort of junior-varsity Congress," *United States* v. *Mistretta*, 109 S.Ct. 647, 683 (1989) (Scalia, J., dissenting), was deemed by the majority to be inapplicable to the sentencing commission in *Mistretta*, the principle itself is unimpeachable and seems an apt description of the role the Department of Labor arrogated to itself in promulgating the free-floating Regulation 500.122(b).

It is almost as though the Deparment had enacted a mini-Rules of Decision Act, directing federal courts in federal question cases to apply the substantive defenses or other door-closing rules of the states in which they sit. The background principles under which federal courts borrow, from those states, statutes of limitation and other ancillary aspects of laws they administer, *see, e.g.*, 42 U.S.C. § 1988, are obviously of no avail when the borrowed state law provision operates to detonate a congressionally created federal cause of action from the moment of its inception in any state with an applicable workers' compensation scheme of the very type criticized as thoroughly inadequate by the Congress that created the federal cause of action.

97 (citation omitted). *Cf. Bowsher* v. *Synar*, 478 U.S. 714, 756 (1986) (Stevens, J., concurring in the judgment).

III. THIS COURT SHOULD NOT HEED PLEAS THAT IT BRUSH ASIDE THE LAW IN ORDER TO AVOID ALLEGED ANOMALIES IN AWPA'S ADMINISTRATION.

Petitioner and its allies contend that several anomalies in the administration of AWPA's private right of action will ensue if the judgment below is affirmed and their pleas for creation of a workers' compensation exclusivity defense to § 1854 liability are rejected. They predict incongruous results and dire consequences unless § 1841(c)'s reference to the adequacy of state workers' compensation insurance coverage as a substitute for a liability policy or bond is construed as a far more sweeping congressional incorporation of workers' compensation "in its entirety," including its exclusive remedy provisions.

Petitioner makes its pleas in the wrong forum. A "seeming incongruity" is insufficient to justify judicial expansion of a limited congressional reference to state law. *Northbrook Nat'l Insurance Co.* v. *Brewer*, 110 S.Ct. 297, 300 (1989). And although it may be "appealing," *id.* at 301, to pass over the most natural reading of a statute in order to avoid accepting a legislative vision that "seems somewhat anomalous," *id.* at 300, this Court should "refuse to attribute to Congress an intent broader than that specifically expressed" in the narrow reference in § 1841(c). *Id.* at 301. Congress "could easily have used language" to make 1841(c) set *maximum liability limits* in addition to setting *minimum insurance requirements*, "and it can easily do so still." *Id.* But that is a legislative task, and those who wish to see it performed should venture across the street to Capitol Hill.

Even if the anomalies that petitioner perceives were relevant to this Court's construction of AWPA, however, they would remain wholly insubstantial.

A. The Nature Of The Legislative Compromise That Led To AWPA's Enactment Does Not Justify Re-Writing Its Express Terms And In Fact Supports The Unfettered Remedial Power Of The Federal Courts Under § 1854.

Petitioner never tires of asserting that AWPA was a "consensus" bill, a grand compromise supported by all sides and interests. PB 13, 21, 22, 23, 25; AFBF Br. 10-11. Reading § 1854 to provide a private cause of action even when workers' compensation applies is untenable, we are told, because that would give farmworkers everything they could wish for in the law: AWPA was a compromise, and everyone knows that a "compromise, by its very nature, is not perfect for either side." PB 23-24. A "farm worker cannot always 'have it all' under the Act." PB 24.

But describing AWPA as a "compromise" bill hardly distinguishes it from the mine run of legislation. It is a rare bill that can get past 535 legislators and one presidential veto *without* being a compromise of sorts. More importantly, affixing the label "compromise" to a law gives petitioner no license to conform that law to its own vision of the legislative compromise *it* would have preferred. The language enacted still controls, and neither § 1841 nor § 1854 makes workers' compensation exclusivity a bar to full federal judicial relief under AWPA's private right of action.

Moreover, petitioner completely misapprehends the nature of the compromise that spawned AWPA in 1983. As revealed by the congressional testimony of the same organizations that appear as *amici* here, what really peeved fixed-site farm employers about the predecessor statute, FLCRA, was the indignity and bureaucratic hassle of being forced to register as if they were fly-by-night farm labor contractors, and the resulting exposure to administrative fines and civil damages for easily cumulated technical registration violations. *1982 House Hearing* at 57-59 (statements of the National Council of Agricultural Employers and American Farm Bureau Federation). *See also supra* pp. 7-8.

Addressing these legitimate employer concerns did not entail reducing the protection of farmworkers. In the transition from FLCRA to AWPA, all the safeguards for farmworker rights were retained and in fact expanded by being made directly applicable to such fixed-site employers as petitioner, who would no longer be required to register as labor contractors.[29] With respect to AWPA's private right of action, the trade-off was an end to employer exposure to "substantial monetary awards for highly technical violations, especially those related to registration status," in exchange for "no limit on the amount of actual damages that can be awarded by a court" where "an intentional violation of the act has been committed . . . ." 128 Cong.Rec. 32,463 (1982) (statement of Sen. Hatch).

Even so, imposition of this liability for full actual damages on fixed-site employers such as petitioner Adams Fruit, a citrus grower, was not accomplished by acclamation. A citrus industry trade association vigorously protested the extention of AWPA's private right of action. *1982 House Hearing* at 176 (statement of Agricultural Producers). Petitioner is of course free to return to Congress with its objections to unlimited liability under § 1854. But for now, the grand compromise of AWPA confirms that workers' compensation coverage is no defense to § 1854.

[29] "Each side achieved some long-sought goal. For instance, the fixed situs agricultural employer groups objected to the burdens of registration as farm labor contractors and objected to the possibility of being selectively subject to the prohibitions on hiring illegal aliens. In exchange for lifting those burdens, the agricultural employer groups agreed to offer certain additional protections to migrant and seasonal farmworkers and assume the joint employer concept . . . ." 128 Cong.Rec. 26,009 (1982) (statement of AWPA co-sponsor Rep. Erlenborn). *See also* 128 Cong.Rec. 32,466 (1982) (statement of Robert Collyer, Deputy Under Secretary of Labor).

B. Petitioner Distorts AWPA's Legislative History In Arguing That, If Such Liability Is In Fact Unlimited, Congress Deceived Farm Employers As To The Amount Of Insurance They Need.

Another of petitioner's repeated refrains is that a judicial refusal to allow workers' compensation as a defense under § 1854 will imperil the solvency of many farmers who have followed Congress' supposed advice and not obtained additional insurance for AWPA liability. PB 9, 10, 14, 20, 22, 31; AFBF Br. 9, 24-25. We are told that Congress could not have "intended to mislead farm employers and expose them to past and present uncovered claims." PB 9. Therefore, it is said, § 1841(c)'s reference to state workers' compensation insurance, as an adequate substitute for the insurance otherwise required by AWPA, must be read to make workers' compensation, where it applies to farmworkers, the exclusive remedy for bodily injury under AWPA.

This entire argument is based not on the language of § 1841(c), which makes no mention of workers' compensation as an exclusive remedy, but on a single line from the House Report: "The Act further provides that in those situations where agricultural workers are transported and are covered by State workers' compensation no additional insurance for damages to persons need be obtained." 1982 H.R.Rep. at 20. Petitioner and its *amici* insist that this sentence constitutes congressional "assurance" to farmer employers that "purchasing any coverage beyond workers' compensation was unnecessary." PB 10. *See also* PB 14; AFBF Br. 24.

As explained above, however, the House Report's statement that no further insurance "need be obtained" means only that no further insurance is *legally mandated*. *See supra* pp. 11, 20-21, 26. This is wholly consistent with liability for full actual damages under § 1854, because such a statutory limit on the insurance one must carry does not set a limit on the liability to which one might be exposed. There is nothing peculiar in this congressional decision to mandate a minimum level of coverage while leaving it up to agricultural employers to decide for themselves how to handle the remainder of their potential risk.

Even if an agricultural employer buys all the personal injury coverage that insurance companies will sell him, his liability for injuries to others is not capped at that level, and his assets remain subject to seizure to satisfy judgments that his insurance will not cover. This is a risk inherent in doing business — or, for that matter, in driving a car.[30] To be sure, someone who has been adjudicated a deliberate AWPA violator may become judgment proof when his insurance coverage has been exhausted and his assets depleted. But this affects not the level of his liability — only the injured party's ability to collect. Partially or wholly uncollectible judgments are a common fact of life. Minimum insurance requirements, like § 1841 of AWPA, are instituted to assure that injured parties get *at least some* of what they have coming to them.[31]

The feigned surprise by petitioner and its *amici* at the extent of liability under § 1854, even in states with applicable workers' compensation regimes, is unconvincing.[32] The statutory language is entirely clear: § 1841(c) by its terms deals *only* with minimum insurance requirements, and § 1854, by *its*

[30] States commonly require automobile owners, for example, to carry a designated minimum level of liability insurance as a prerequisite to registering and operating their vehicles, but that requirement does not limit the owners' liability. That, of course, is why many drivers buy more than the legal minimum of coverage.

[31] Even considered within the confines of AWPA, there is no anomaly in the fact that workers' compensation may fulfill a farm employer's insurance obligation without fully exempting the employer from all personal injury liability incident to his transportation of farmworkers. That situation obtains even under the Labor Department's and petitioner's reading of AWPA with respect to injured parties who are not employees, such as the families of migrant workers or third parties. Regulation 500.121(d) normally requires insurance against liability to such parties, but that requirement appears to be suspended by §§ 500.121(a) and 500.122(b) in states where workers' compensation applies to farmworkers. Of course, farmers may still choose to insure against this liability, just as they are free (but not required) to obtain liability insurance beyond workers' compensation.

[32] For example, the American Farm Bureau Federation has apparently recognized from the beginning that workers' compensation was no bar to private civil liability under federal law, since it supported the Ireland Amendment intended to change that situation in 1978. *See 1978 House Hearing* at 120, 123 (statement of C.H.Fields, AFBF). As noted above, p. 10, some agricultural groups likewise opposed the extention of what they deemed "oppressive" private civil liability to fixed site employers in AWPA in 1983.

terms, provides for awards of full actual damages as well as all appropriate equitable relief without hinting at any workers' compensation defense.

Federal insurance requirements for transportation of farmworkers under FLCRA and AWPA have *always* been understood to be statements of legal mimimums, not advice to farmers on advisable maximums. In the 1974 Hearings on FLCRA, *amicus* American Farm Bureau Federation opposed the minimum transportation insurance requirements on the ground that it would be onerous or impossible for many labor contractors to obtain coverage: "If the purpose of this bill is to put most of the labor contractors out of business, it may very well accomplish its purpose." *1974 Senate Hearings* at 155 (statement of C.H.Fields, AFBF). Senator Nelson replied that that was not the bill's purpose, and explained that the congressional policy was to guarantee that damage awards would be at least partially recoverable while otherwise leaving employers free to insure to the level their judgment dictates:

> There are individual workers who have suffered disasters, death and injury from being hauled in poor equipment that I am sure you are well aware of, and the objective here is to see if we can provide some adequate insurance to protect them. There are all kinds of individuals, just for their own automobile, who carry that much insurance, even though they are not carrying anybody else in the car for commercial hire. I carry more than that myself.

Id. at 155 (statement of Senator Nelson). Petitioner and its fellows have always been similarly free to insure beyond the AWPA minimum, and Congress never advised them to do otherwise.

If petitioner or any other farm employer misunderstood § 500.122(b) as advice by the Department of Labor not to buy liability insurance in excess of workers' compensation, it might conceivably wish to complain to DoL if it then gets hauled into federal court on an AWPA damages claim for which it is

under- or un-insured. But it is hard to see how an employer sued for damages under § 1854 could have anyone but itself to blame for its unhappy situation, since AWPA liability does not thunder down on hapless employers like a bolt from the blue: AWPA is not a no-fault regime; no employer is liable under § 1854 unless it *intentionally* violates AWPA's provisions. And even if one accepts that the DoL may have indirectly given bad advice about insurance coverage, it certainly did *not* advise employers to violate federal law. Thus, with respect both to obtaining ample insurance and to eshewing intentional violations of the law, petitioner's fate has always been in its own hands.

In any event, a defendant's imprudent reliance on such an unauthorized, *ultra vires* act *of the government*, which is not even a party to this litigation, certainly cannot defeat a *private* plaintiff's right to bring a *private* damages action under AWPA. To reach any other conclusion would radically rewrite the law of estoppel. In the name of honoring a wholly unjustified form of reliance by businesses in petitioner's situation, it would reduce the full damages guarantee of § 1854 to what Justice Jackson — in an early case of hostility to migrants — called a "promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards* v. *California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

C. The "Double Dipping" That Petitioner Decries Is Neither Unusual, Nor Unavoidable, Nor Objectionable.

Petitioner contends that Congress could not have intended that injured farmworkers collect both workers' compensation benefits and AWPA statutory or actual damages for the same work-related injury. Such "double-dipping," we are told, would be a senseless aberration. PB 19-20, 22, 30. The American Farm Bureau Federation asserts that "[v]irtually all other employees in the United States are limited to their workers' compensation remedies; there is no evidence that Congress wanted to give agricultural workers rights in excess of those other employees." AFBF Br. 20.

Petitioner and its *amici* are once again mistaken. Recovery under *both* a state workers' compensation system and a federal statutory remedy is hardly unique to AWPA. This sort of remedial overlap exists under the Longshoremen's and Harbor Workers' Compensation Act,[33] the Jones Act,[34] and the Civil Rights Act.[35] Nor is it surprising that this federal overlap exists with respect to migrant and seasonal farmworkers, who in § 1854 of AWPA enjoy a carefully tailored private cause of action, with no diversity requirement and no administrative exhaustion requirement, as well as provisions for statutory liquidated damages, unlimited actual damages and court-appointed attorneys. Migrant and seasonal farmworkers are deemed a special case throughout federal law. They are left out of the protection of some laws,[36] while their unique transient and seasonal status entitles them to special treatment, dedicated programs and more lenient eligibility rules under a host of other federal statutes.[37]

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[33] *See Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. at 723-24 (the congressional plan was "[c]oncurrent jurisdiction for state and federal compensation laws" in order to "rais[e] awards to a federal minimum").

[34] *See Roberts* v. *City of Plantation*, 558 F.2d 750, 751 (5th Cir. 1977) ("If plaintiff can prove himself entitled to Jones Act recovery, the exclusive remedy provisions of Florida's workmen's compensation statutes cannot oust the federal court of its jurisdiction."); *Manuel Caceres* v. *San Juan Barge Co.*, 520 F.2d 305, 306 (1st Cir. 1975) ("The Jones Act by its terms gives this plaintiff a cause of action; he retains it unless some other statute validly deprives him of it," and nothing in federal law "extend[s] to Puerto Rico the power to supplant federal maritime law").

[35] *See Rosa* v. *Cantrell*, 705 F.2d 1208, 1221 (10th Cir. 1982) (even though plaintiff accepted workers' compensation death benefits, the "exclusive remedy of state Workers' Compensation statutes does not bar recovery against an employer under [42 U.S.C.] § 1983."), *cert. denied*, 464 U.S. 821 (1983).

[36] Agricultural workers are not subject to the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 213(b)(12), and those employed on small farms are not covered by the minimum wage requirement of that Act, *id.*, § 213(a)(6) or by the Occupational Health and Safety Act, 29 C.F.R. § 1928.110(a). Farmworkers are likewise excluded from the National Labor Relations Act, 29 U.S.C. § 152(3).

[37] Migrant farmworkers are afforded special treatment under the Food Stamp Act to facilitate their receipt of benefits. *See, e.g.*, 7 U.S.C. §§ 2014(f)(2)(A) & (k)(2)(E). *See also* Child Nutrition Act, 42 U.S.C. § 1786(f)(C)(iv) (special plan to meet nutritional needs of migrant workers and their children); Elementary and Secondary Education Act, 20 U.S.C. § 2761 (special program addressing needs of migrant children); Job Training Partnership Act, 29 U.S.C. § 1672

The dual recovery that petitioner and its *amici* find so strange is in fact a familiar phenomenon in state as well as federal law. Workers' compensation exclusivity provisions do not stop an injured worker from recovering under two different states' workers' compensation programs (or from one state's workers' compensation scheme and another state's tort remedies) for the same injury. *See supra* pp. 17-19. And in some states injured workers can recover under both workers' compensation and another disability insurance scheme, such as unemployment compensation, despite an exclusivity provision.[38]

Lest this seem a shameless parade of double-dipping, it must be remembered that the right to pursue two *remedies* does not necessarily result in duplicative *recovery*. The court below recognized the power of a district court to offset workers' compensation benefits when calculating an award of actual damages under § 1854. CPA 14a-15a. Although petitioner and its *amici* protest that such offsets are unworkable, PB 30-31; Brief Amicus Curiae of John I. Haas, Inc. 4-5, their self-serving prognostications are contradicted by the experience of this Court and many others, which have long found offsets to be an acceptable and effective means of preventing duplicative recovery under workers' compensation and some other legal remedy or insurance scheme.[39] Indeed, such setoffs have already been successfully employed in this very case, requiring respondents fully to reimburse the Florida workers' compensation insurer after they prevailed in a separate products liability suit against the manufacturer of the defective tire that caused their accident. *See supra* note 11.

(special program for migrant and seasonal farmworkers); Immigration Reform and Control Act, 8 U.S.C. § 1160 (special procedures for legalization of alien agricultural workers).

[38] *See, e.g. Montney* v. *State Highway Department*, 772 P.2d 360, 363-64 (N.M.App. 1989) (dual recovery is available under workers' compensation and Public Employees Retirement disability insurance, unemployment compensation benefits or veterans' disability benefits), *cert. denied*, 769 P.2d 731 (N.M.S.Ct. 1989).

[39] *See, e.g., Sun Ship*, 447 U.S. at 725 n.8; *Landry* v. *Carlson Mooring Service*, 643 F.2d 1080, 1088 (5th Cir.), *cert. denied*, 454 U.S. 1123 (1981); *Reese* v. *Sears, Roebuck & Co.*, 731 P.2d 497, 503 (S.Ct.Wash. 1987); *Hamilton* v. *County of Los Angeles*, 131 Cal.App.3d 982, 997 (1982).

Petitioner's concern about double recovery is in any event misplaced. Workers' compensation and AWPA address distinct problems and have different aims. The former arose to protect employees, "victims of industrial injuries who had been deprived of other remedies because of common law doctrines such as contributory negligence and the fellow servant rule." *Reese* v. *Sears, Roebuck & Co.*, 731 P.2d 497, 503 (S.Ct.Wash. 1987). *See also Boscaglia* v. *Michigan Bell Tel. Co.*, 420 Mich. 308, 315 (Mich.S.Ct. 1984). Section 1854, in contrast, is an enforcement and compensation mechanism for *anyone* (not just employees) aggrieved by *intentional* (rather than "no fault") violations of AWPA's panoply of farmworkers' rights and safety standards.

The supposed overlap between AWPA and workers' compensation is thus uncertain at best.[40] As petitioner concedes, PB 18 n.4, even exclusive workers' compensation regimes do not displace common law actions for intentional torts, and there are major and subtle variations among the states as to the meaning of intent. For example, some states have construed workers' compensation not to displace actions against employers who knowingly or recklessly violate safety regulations or furnish unsafe workplaces.[41]

[40] The Florida Supreme Court, for example, has itself recognized that workers' compensation does not displace and is no substitute for a federal cause of action provided as part of an important federal policy, such as the civil rights laws. *Byrd* v. *Richardson-Greenshields Securities, Inc.*, No.72,788, slip op. at 9-10 (Fla.S.Ct. Oct. 26, 1989). Section 1854 of AWPA was consciously modeled as a civil rights statute for migrant and seasonal farmworkers. *See supra* p. 3.

[41] *See, e.g., Mandolidis* v. *Elkins Industries, Inc.*, 246 S.E.2d 907, 914 (S.Ct.App.W.Va. 1978) (workers' compensation exclusivity no bar to tort action alleging wilful, wanton or reckless employer misconduct, or employer knowledge and consciousness that injury is likely to result from the safety violation or failure to correct the safety violation); *Greene* v. *Carolina Freight Carrier*, 663 F.Supp. 112, 114 (S.D.W.Va. 1987) (workers' compensation exclusivity no bar to tort action alleging that employer required employee to work under known specific unsafe working condition); *Davis* v. *Rockwell Int'l Corp.*, 596 F.Supp. 780, 786 (N.D.Ohio 1984) (workers' compensation exclusivity no bar to tort action alleging an intentional failure to warn employees of dangerous conditions; no actual intent to injure is required); *Carpentino* v. *Transport Ins. Co.*, 609 F.Supp. 556, 562 (D.Conn.1985) (allegations of willful employer misconduct may be enough to escape exclusivity bar).

But this Court need not canvas the meaning of "intentional tort" throughout the Union nor even carefully compare the intent standards under AWPA and Florida law. For the point is that, in the face of a patchwork quilt of state common law remedies, workers' compensation schemes and safety regulations, Congress determined that state law in all its manifold forms was inadequate to protect migrant workers or to redress their injuries. That is why federal legislation and a private federal right of action were enacted.

D. The Real "Anomaly" Congress Could Not Have Intended Is To Have Enforcement Of AWPA Subordinated To And Blunted By A Bewildering Array of State Workers' Compensation Laws.

AWPA was born of Congress' determination that states could not or would not prevent exploitation of farmworkers and ensure sufficient compensation for their injuries. Section 1854 embodies Congress' recognition that administrative and even criminal enforcement by the Department of Labor (or state regulators) was woefully inadequate to ensure compliance with the law. A private cause of action was essential.

Petitioner would nonetheless return migrant and seasonal farmworkers to the very conditions of lax enforcement and miserly, haphazard compensation that AWPA was written to rectify. Reversal of the judgment below would leave the enforcement of federal law and the availability of federal remedies dependent upon the vagaries of state law, thereby frustrating both of § 1854's ends. This is well illustrated by the order of the district court in this case, which denied respondents *all* federal relief on the vehicle safety violations they alleged — actual damages, statutory damages and injunctive relief. The district court ruled that "liability for Workers' Compensation benefits is an exclusive remedy and that no additional remedy is available" under AWPA. CPA 19a.

Although that result constitutes a serious and unacceptable obstruction of congressional will, the particular circumstances of this case must not be allowed to obscure the fact that Regulation 500.122(b), which reversal of the judgment below would reinstate, takes an even bigger bite out of AWPA. This regulation is not limited to injuries resulting from *transportation* of farmworkers. It purports to make workers' compensation the exclusive remedy for *all* "loss under this Act in the case of bodily injury or death."[42] If a worker is injured or killed because of a failure to comply with AWPA's *housing* provisions, 29 U.S.C. § 1823 — for example, in a fire caused by structural defects and aggravated by a lack of fire exits or fire extinguishers — the regulation seemingly provides that recovery is limited to workers' compensation. Yet the state compensation regime might not extend benefits for this particular injury, perhaps because of the state's "bunkhouse rule," and the Labor regulation would limit the worker to the compensation to which he is entitled under the state's workers' compensation regime — in this case, nothing.

Regulation 500.122(b) would work similar injustices in other circumstances where injured farmworkers would be *covered* by workers' compensation but would, for various reasons, fail to qualify for benefits — for example, by missing fewer than the threshold number of days of work — or would be limited to a niggardly schedule of one-time benefits despite suffering a grievous injury that nevertheless did not, for a migrant farmworker, constitute a permanent disability. A state workers' compensation board might well find that, even after losing an eye or several fingers or suffering mild brain damage, a migrant worker could still pick oranges or harvest lettuce. Under petitioner's reading of the law, such victims would be denied relief under AWPA and would be relegated to whatever state workers' compensation provided — be it little or nothing.

The regulation raises the further prospect that federal damage actions for intentional violations of AWPA would be barred even if state law, because of the exception for intentional torts, would allow a common law tort action in state court. This would

[42] Indeed, the Fourth Circuit Court of Appeals has already held that state workers' compensation excludes relief under AWPA for other work-related injuries, such as being sprayed with toxic pesticides while in the fields. *Roman v. Sunny Slope Farms*, 817 F.2d at 1120; CPA 29a.

lead to the absurd result that a state exclusivity provision incorporated into federal law would restrict the jurisdiction of federal courts more than that of the state's own judicial tribunals!

The only way to avoid this multitude of anomalies would be for this Court to put a substantial judicial gloss on Regulation 500.122(b), interpreting it to mean that AWPA statutory and actual damages are barred *not* whenever "a State workers' compensation law is *applicable*," § 500.122(b), but only when workers' compensation benefits *would be awarded*. That in turn would lead to still further anomalies. For example, if a worker needed seven lost work-days to qualify for workers' compensation, a worker who missed only six days of work could claim full actual or statutory damages under AWPA, while a worker injured in the very same accident but who missed eight days or two weeks would find his recovery limited to workers' compensation benefits.

Of less dire consequence to injured farmworkers but of great immediate interest to this Court are the problems of judicial administration and application posed by the regulation and by petitioner's reading of AWPA. Every time suit was brought for damages under § 1854, the federal courts would be compelled, as a preliminary matter, to investigate the particular state workers' compensation law and the particular accident in order to make a bewildering array of determinations necessary to federal consideration of the claim.[43] It is no answer to

[43] Among others, these required determinations would presumably include:
(1) whether the employer participated in the workers' compensation scheme;
(2) whether the injured employee had elected to participate in the scheme — in several states, farmworkers may opt out of the state workers' compensation scheme and retain their common law tort remedies regardless of their employers' wishes. Arizona, Massachusetts, Nebraska and Rhode Island allow such employee opt-outs. *See* Employment Standards Administration, U.S. Dept. of Labor, State Workers' Compensation Laws, Table 3 (1989) ("1989 DoL Report");
(3) whether the employee had worked enough hours for that employer or for that year to be covered, and whether the employer had enough employees that year on the payroll or had paid enough to employees in the previous quarter to qualify for coverage under the scheme — many states exclude farmworkers from workers' compensation if they count as part-time employees or if their employer does not annually make use of a sufficient number of man-hours of migrant labor. Among the states using diverse standards along these lines are Alaska, Florida, Illinois, Iowa, Michigan, Oklahoma, Texas, Utah and Vermont. *See* 1989 DoL Report, Table 3;
(4) whether there was an exclusivity provision;
(5) whether there was an exception thereto for intentional torts;
(6) what the standard for intent was and whether that exception was applicable to the facts of the instant case;
(7) whether the employee had been injured incident to his work;
(8) whether the employee was doing the particular sort of farm labor covered by the scheme — Wyoming and South Dakota limit coverage to workers engaged in "power farming" or the operation of heavy machinery. *See* 1989 DoL Report, Table 3;
(9) whether the employee met any other requirements for coverage under the scheme — for example, North Carolina limits coverage to agricultural extension service employees and Georgia's scheme covers only state prisoners engaged in farm labor. *See* 1989 DoL Report, Table 3;
(10) whether, despite coverage of the employee under the scheme, the nature of the injuries and extent of disability or worktime lost were insufficient to entitle the employee to benefits; and
(11) if the AWPA claim were a class action for statutory damages, which employees (if any) had already suffered injury and were therefore barred by the regulation, and how that determination would affect the status of the remainder of the class plaintiffs.

say that the determination of whether a particular state's workers' compensation scheme covers an injured employee is a simple matter of asking whether that employee has already collected workers' compensation benefits. For no exhaustion of administrative remedies is required under AWPA, and an injured worker could forego applying for workers' compensation altogether or apply only after bringing an AWPA suit. Thus federal courts would routinely be required to struggle with a perplexing tangle of state law issues. As the Labor Department informed Congress when testifying against a proposed workers' compensation exclusivity defense in 1978, it would be "administratively infeasible to incorporate such varied and unclear State laws" into the federal statutory regime. *See supra* note 5.

Finally, there is the very real question of whether AWPA's safe transportation and housing standards will mean *anything at all* in those states where farmworkers injured by violations thereof cannot sue in federal court and can recover only workers' compensation benefits. Although farmworkers can still, even under petitioner's theory of AWPA, seek statutory damages for violations of the Act so long as they sue before they

have been injured in any way, PB 22-23; AFBF Br. 23, it is obvious that the most common (and most important) occasion for enforcing AWPA's safety standards will arise when someone has been hurt. Payment of workers' compensation insurance premiums is no deterrent for an employer who finds violation of AWPA convenient and economical. As the court below noted, " 'it ought not to be cheaper to violate [the Act] and be sued than to comply with the statutory requirements.' " CPA 12a (quoting *Beliz* v. *W.H.McLeod & Sons Packing Co.*, 765 F.2d 1317, 1332 (5th Cir. 1985)).

Unless the judgment below is affirmed, enforcement of AWPA's safety standards will be similarly hobbled by the elimination of injunctive relief when a worker has been injured. The district court in this case threw out *all* of respondents' claims for relief — both legal and equitable — with respect to the vehicle safety violations. CPA 19a. That comports with the Labor Department regulation that petitioner would have this Court reinstate, for § 500.122(b) declares, without an exception for injunctive relief, that "workers' compensation benefits are the exclusive remedy for loss under this Act in the case of bodily injury or death." But surely it is in those cases where violations of AWPA safety standards have *already* caused the loss of life or limb that the need for an injunction requiring future compliance with federal law is greatest. It "would be a *tour de force* of statutory misinterpretation," *Sun Ship*, 447 U.S. at 721, to construe AWPA to deny migrant farmworkers injunctive relief in precisely those instances where they clearly need it most.

Petitioner and its *amici* reassure this Court that administrative enforcement by the Department of Labor, along with the trickle-back economic pressure of a bad workers' compensation accident rate, will be sufficient to deter AWPA violations by agricultural employers. PB 22-23; AFBF Br. 22-23. This argument is irretrievably stale: those very enforcement mechanisms were found grossly inadequate by Congress in 1974 and again in 1983 when it enacted a private right of action for farmworkers. Moreover, petitioner overlooks the fact that even if, arguendo, some enforcement of AWPA can continue under a

§ 1854 that has been largely scuttled by state law, it is beyond cavil that petitioner's reading of the Act would torpedo Congress' other aim of ensuring that "full actual damages would be awarded in every case," 128 Cong.Rec. 32,463 (1982) (statement of Sen. Hatch).

CONCLUSION

Petitioner's dissatisfaction with the contours of congressional policy judgments cannot justify importing new substantive state law defenses into a federal cause of action or justify stripping federal courts of remedial jurisdiction that Congress has expressly conferred. That the Executive Branch was prepared in 1983 to legislate to the contrary — in a regulatory enactment that the Executive does not now defend — cannot justify a different result.

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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